U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 December 2003

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In the Matter of:

FLOYD LUCAS,
Complainant,

v. **Case No.: 2002-STA-00036**

M & C TRUCKING,
Respondent.
…….. .

Jeffrey Grimstead, Esq., Fredericksburg, VA
For Claimant

Craig Palik, Esq., McNamee, Hosea, Jernigan, Kim, Greenan & Walker, Greenbelt, MD
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above captioned matter arises from a claim under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (hereafter "STAA" or "Act") of 1982, as amended and re-codified, 49 U.S.C. § 31105. The pertinent implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations (hereafter "CFR"). Section 405 of the STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms or privileges of employment because the employee has undertaken protected activity by either 1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or 2) refusing to operate a motor vehicle when the operation would violate these rules.

PROCEDURAL BACKGROUND

Procedural History

On March 13, 2001, Mr. Floyd Lucas (hereafter "Complainant") filed a discrimination complaint under the Act, alleging that Respondent, M & C Trucking (hereafter "Respondent"), terminated his employment on November 30, 2001, in retaliation for raising safety complaints

regarding the safety of Respondent's trailers. Following an investigation, on May 13, 2002, the Regional Administrator for Occupational Safety and Health Administration (hereafter "OSHA"), of the United States Department of Labor (hereafter "DOL"), found no reasonable cause to believe that Respondent violated the Act and dismissed the Complaint. Specifically, OSHA determined that Respondent discharged Complainant for "insubordination and disloyalty due to Complainant's attempts to solicit business away from [ ] Respondent and by interfering with other drivers, [by] telling them to boycott [ ] Respondent." Complainant filed a timely appeal of this decision by letter of June 12, 2002. On June 17, 2002, the undersigned issued a Notice of Assignment, Notice of Hearing and Order advising Complainant and Respondent that a hearing on this matter was scheduled for July 9, 2002 in Washington, D.C.

Claimant submitted an unopposed motion for continuance on June 27, 2002 via facsimile, which I granted by my June 28, 2002 Notice and Order Rescheduling Hearing. As a result, the hearing was rescheduled for September 12, 2002 in Washington, D.C.

Complainant submitted a second motion seeking a continuance via facsimile on September 4, 2002, requesting additional time for Complainant's counsel to prepare, as the attorney from his office originally assigned to this matter resigned from employment with his firm, leaving counsel for the Complainant "with a case that he was unfamiliar with both as to the facts of the case and the applicable law." Complainant also noted that certain discovery requests were outstanding. Respondent opposed this request by Opposition to Motion for Continuance, filed with this tribunal on September 5, 2002. However, Respondent withdrew its opposition via facsimile filing of September 6, 2002.[1]

On September 10, 2002, I issued an Order Canceling Hearing, informing all parties that the September 12, 2002 hearing would be canceled and that a new hearing date would be scheduled for "a mutually convenient time." Ultimately, the parties were notified that the hearing was rescheduled for December 4, 2002, continuing to December 5 if necessary, through my Notice and Order Rescheduling Hearing of September 26, 2002.

Record of Hearing/Evidence

A hearing on this matter was held in Washington, D.C. on December 4, 2002.[2] The parties were represented by counsel and received a full and fair opportunity to present evidence and arguments, and examine the following witnesses: Mr. Billy Myers, shipping and receiving supervisor for Trussway, Ltd. (hereafter "Trussway") (Tr. at 11-31); Mr. Timothy Ward, shipping and receiving supervisor for Trussway (Tr. at 32-45); Complainant (Tr. at 46-120, 204-213); Mr. Shirley Worthem, driver for Respondent (Tr. at 120-28); Mr. Matthew Finnell, driver for Respondent (Tr. at 128-35); Mr. Donnel M. Jones, driver for Respondent (Tr. at 135-44); Mr. Manuel Vasquez, driver for Respondent (Tr. at 144-53); Mr. Harold Simms, driver for Respondent (Tr. at 153-60); Mr. Robert Clegg, contract mechanic for Respondent (Tr. at 161-71); and Mr. James Dexter Ravenell, general manager of Respondent (Tr. at 171-204).

[1] I note that the cover letter accompanying Respondent's Praecipe is incorrectly dated August 6, 2002.

[2] References to the hearing transcript appear as "Tr." followed by the applicable page number(s). Exhibits offered by Complainant and Respondent will be referred to as "CX" and "RX," respectively, followed by the exhibit number.

The following exhibits were offered and received during the hearing: CX 1 (August 21, 2001 proposal by Complainant to Trussway), CX 2 (Time Sheets), RX 1 (Nov. 30, 2001 termination letter), RX 3 (Time Sheets), and RX 4 (same as CX 1). Both parties waived the right to submit post-hearing closing briefs, and the record was not held open for any reason. (Tr. at 222-23). The record is now closed and the findings of fact and conclusions of law detailed herein are based solely on the testimony and evidence admitted at the hearing. Where pertinent, I have made credibility determinations concerning the evidence and testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

Complainant has been a professional truck driver for approximately thirty-two years, operating as an independent contractor for approximately the past six years. (Tr. at 46-47). As an independent contractor, Complainant owns and operates his own tractor, and enters into contracts with various companies to haul freight for them. (***See*** Tr. at 47-48).

Nature of Employment Relationship:

Trussway manufactures materials used in the construction industry, such as wall panels and roof and floor trusses. (Tr. at 13). Respondent, in turn, is party to an exclusive contract with Trussway to provide trucking services and deliver Trussway goods to its customers. (***See*** Tr. at 12-13). Billy Myers testified that, at the time of the hearing, Trussway made use of approximately twenty-one or twenty-two trailers, which are primarily owned or leased by Trussway and Respondent, to conduct deliveries. (Tr. at 14). Respondent, though, is solely responsible for maintenance on all the trailers, irrespective of actual ownership, and makes all arrangements for repair work. (Tr. at 15-16, 73; ***see also*** Tr. at 89). Additionally, Respondent is responsible for obtaining all necessary licenses and permits. (Tr. at 19-20).

On or about January 1, 2001, Complainant entered into an agreement with the late Mr. Maurice Riley, the former owner of Respondent, to provide trucking services to Trussway for Respondent as a subcontractor. (***See*** Tr. at 48, 106, 172). This employment relationship ended on November 30, 2001 when Respondent terminated Complainant from employment. (Tr. at 50; RX 1). While employed by Respondent, Complainant was never disciplined, had a good rapport with his co-workers and supervisors, and was generally regarded as a very reliable driver. (Tr. at 14, 73).

Complainant's Alleged Protected Activity:

Complainant's Reporting of Safety Concerns. After being hired by Respondent, Complainant was assigned specific routes to deliver items manufactured by Trussway to contractors. (Tr. at 49). For Complainant's first assignment, he hauled a load to a contractor in Virginia Beach, but following that delivery, his assignments consisted mostly of more lucrative local runs because he was very efficient. (Tr. at 48-49, 92). When Complainant's employment with Respondent became more permanent, Complainant asked Mr. Riley for a written lease

agreement setting forth the relationship between Respondent and Complainant, which Complainant testified was never provided to him, or any other driver who so requested, during the course of his employment for Respondent. Complainant testified that Department of Transportation (hereafter "DOT") regulations require a written lease agreement between Complainant and Respondent to allow subcontractors, like Complainant, to make deliveries on behalf of Respondent, given that he is not a party to the original trucking contract between Respondent and Trussway. Without the agreement, Complainant risked greater liability because, as informed by his insurance company, if he were involved in an accident and did not have all the necessary and appropriate state permits, they would be unable to defend claims against him on his behalf.[3] (***See*** Tr. at 49-50, 52; ***see*** Tr. at 61 (Complainant testifying that Mr. Finnell was detained for two days at a weigh station in North Carolina due, in part, to the fact that he could not produce a written lease agreement)).

According to Complainant, the liability issue was compounded by the poor condition of Respondent's trailers. Complainant stated that the condition of the equipment with which he worked, was "in horrible shape," and that he outright refused to drive certain trailers due to their unsafe conditions. (Tr. at 50-53, 90-91). Mr. Ravenell, general manager for Respondent testified, on the other hand, that most of the trailers that Complainant used were new. (Tr. at 184). Complainant stated that a typical problem was that the trailer brakes would be inoperable due to the fact that "the wheel was froze up," and that he even crawled under the trailer and showed this deficiency to Mike Dianza, an on-site manager for Trussway. (Tr. at 50-51, 58, 91). Complainant further testified that he and the other drivers would routinely have to adjust certain systems, such as the lights or the brakes before leaving the yard in the morning, and would occasionally have to stop on the road and purchase parts to repair the trailer in the course of delivering their shipments. (Tr. at 51, 58, 60, 90). Complainant stated that trailers in need of repair often returned to the truck yard but he could not recall any time that a trailer in poor condition was immediately pulled from service until the necessary repairs were made. (Tr. at 74). The condition of the trailers was a constant source of aggravation for the duration of Complainant's employment from January 2001 through his termination in November 2001 and throughout that time, Complainant voiced his safety concerns. (Tr. at 88).

Mr. Myers, Trussway's shipping and receiving supervisor, acknowledged that the trailers had minor problems from time to time, but that these were fixed by Respondent when they arose. (Tr. at 15, 18). Mr. Myers also offered testimony that he could not recall any significant mechanical problems involving any of the trailers while Complainant was employed by Respondent. (Tr. at 18-19). Mr. Myers stated that all of the drivers, including Complainant, raised complaints about the condition of the trailers from time to time, and that those issues were addressed in course. (Tr. at 20). All drivers were responsible for checking the trailer for unsafe conditions before leaving the yard, and if the driver was concerned about the condition of a particular vehicle, he would not be forced to take that load. (Tr. at 20).

[3] As a result of Respondent's lack of providing the lease agreement, when a trucker was cited for improper maintenance on the trailer, the citation was written to the driver rather than Respondent. Complainant attributes Respondent's clean safety record to this practice because citations were rarely, if ever, attributed to Respondent. (Tr. at 210).

Other concerns of Complainant were related to Respondent's failure to obtain the appropriate state permits, specifically wide load permits. Particularly, in Maryland, North Carolina, and Virginia, certain truck drivers would intentionally bypass weigh stations when delivering their loads to avoid being caught without the appropriate licenses and required paper work, including pre-trip and post-trip safety inspections of the trailers. Again, liability for failure to have any of these required papers would fall on Complainant and the other drivers personally because they did not have a lease agreement from Respondent. (Tr. at 49-51, 55, 60-61, 85-86, 93). According to Complainant, all of the drivers were "very concerned" about these working conditions. (Tr. at 61).

Complainant also described specific incidents involving unsafe conditions that he experienced while en route to his delivery destinations. Claimant testified that on January 26, 2001, he was involved in an accident, which he attributes to the fact that Respondent provided "defective equipment and poor straps," explaining that his truck was equipped with two inch straps when four inch straps should have been used to hold his cargo in place. (Tr. at 60; CX 2). For the same load, his trailer was detained at a weigh station due to "bad springs," and he could not continue on his delivery route until a mechanic came to repair the vehicle.[4] (Tr. 59-60). Complainant recorded this incident on his time sheet. It is the only entry identifying a specific problem he encountered. (Tr. at 88; CX 2).

Complainant stated that, at first, he would raise these complaints directly to Mr. Riley. Later, he also contacted Mr. Ravenell, who began working for Respondent during Complainant's tenure with Respondent; Mrs. Riley, who was occasionally present; Mr. Dianza; and another individual employed by Respondent whose name Complainant could not recall, to express his concerns about general safety and the lack of proper state permits. (Tr. at 51-52, 57-58, 89). While Complainant could not recall specific dates that he raised safety concerns to Respondent, he did testify that he would contact Trussway employees, including Mr. Myers, Mr. Ward, and Mr. Dianza, "on a daily basis." (Tr. at 58, 80; ***see also*** Tr. at 62, 89). Complainant would also voice his concerns at monthly meetings attended by Trussway representatives. (Tr. at 88). Mr. Riley, the only person to represent Respondent at these meetings, only occasionally attended. (Tr. at 88-89). Complainant testified that at each meeting, Trussway would assure the drivers that the problems Complainant and the other drivers raised would be addressed. (Tr. at 88-89). When Complainant finally realized that Respondent was taking no action regarding his concerns, he began to seek assistance from Trussway directly in October 2001. (Tr. at 118-19). Mr. Ravenell testified that he was unaware of any safety concerns ever raised by Complainant in the over 450 trips that he had taken.[5] In addition, there was not a single incident where Complainant refused to take a load for safety reasons. (Tr. at 90, 177). Complainant testified that when he was assigned a trailer that would not pass inspection, he would fix the trailer himself before he would leave or he would fix it on the road before he got to the scales. (Tr. at 90).

[4] Complainant stated that although Mr. Riley arrived at the weigh station with a mechanic, the repairs were not performed and he was "told to continue." (Tr. at 59).

[5] Mr. Ravenell actually held the position of general manager beginning in August 2001 and was thus present during only the last four months of Complainant's employment. (Tr. at 190).

Respondent's Addressing of Safety Concerns:

Trailer Repair. In response to the complaints raised by the drivers, Trussway hired a maintenance company, Truck Maintenance Enterprise, in August 2001 to examine the trailers and make necessary repairs. Claimant testified, however, that this practice ended after costly repairs were made to only two trailers. (Tr. at 62). Therefore, Complainant and the other drivers continued to complain to Trussway employees about their safety concerns. (Tr. at 63).

Respondent employed on-site mechanics, but Complainant testified that these individuals would not actually perform needed repairs, and would shirk their responsibilities and obligations. (Tr. at 83, 116). Complainant further explained that while the mechanics would make occasional light repairs, they would not work on more serious problems, such as brake systems. (Tr. at 84, 116-17). In addition to the on-site mechanics, Respondent also hired R & S Truck Repair on a retainer basis to perform repairs as needed; however, Complainant testified that he was never informed of the availability of the mechanic at R & S Truck Repair while he worked for Respondent. During Complainant's employment, he never personally took a trailer to a mechanic for repairs. (Tr. at 85, 89).

Complainant stated that he finally contacted an individual at DOT at some point around April 2001 but could not remember the exact date. (Tr. at 80-81). While there, a DOT employee instructed Complainant to fill out the requisite paperwork if he wished to file a formal complaint with the DOT, but he also informed Complainant that the agency "d[id] not have the manpower to go and investigate" Complainant's concerns even if he did file a formal complaint. (Tr. at 81-82). Therefore, Complainant never completed the formal complaint; he did, however, tell Maurice Riley and Tim Ward about this meeting. Mr. Riley promised Complainant that he would address his concerns in the near future. (***See*** Tr. at 82-83).

After having a conversation with Complainant in August 2001, in which Mr. Ravenell became aware of the licensing problems the drivers were experiencing, he obtained permits from various states and requested that Trussway provide him with the needed information to activate the one-day licenses. Since that time, most drivers at the time of the hearing were equipped with the proper licenses when making deliveries; however, if a driver does not contact Mr. Ravenell to inform him of the need for the license, then the driver still runs without the permit. This still occurs on occasion. (Tr. at 188-189).

Complainant's Alleged Wrongful Activities:

Alleged business take-over. According to Complainant, in August 2001, Mr. Myers notified Complainant that Trussway was examining the possibility of awarding the hauling contract to a different company and encouraged Complainant to submit a proposal. (Tr. at 65; ***see also*** Tr. at 67 (Complainant stating that Mr. Ward informed him of the same), (Tr. at 89 (Complainant stating that he was informed at a monthly meeting that Trussway was "looking into other contractors.")). Complainant met with Mr. Dianza, who also suggested that he submit a proposal that he would forward to Trussway's management. (Tr. at 65, 67; ***see also*** Tr. at 102-03). Complainant promptly drafted a letter on August 28, 2001, in which he explained to Trussway that if he were awarded the contract, he would personally ensure that all of the trucks

and trailers were maintained properly, that each job site was accessible and appropriately sized trailers were used, and that all necessary permits were obtained. (Tr. at 65-66; CX 1). Complainant testified that he received no response from Trussway regarding his letter. (Tr. at 104).

Complainant denied ever discussing monetary issues with Trussway, but commented to Mr. Dianza that many of the drivers were slightly disgruntled due to the pay situation, and that Complainant would probably take 10 percent off the top rather than 15 percent if he were in Respondent's position. (Tr. at 68; ***see also*** Tr. at 105-06). Complainant also testified that several of the drivers were upset after they learned that Respondent kept 15 percent of what it charged Trussway for delivery services. (***See*** Tr. at 63). Complainant explained that his sole concern at all times was the condition of the trailers, not pay; however, Complainant acknowledged that the general focus of the drivers gradually shifted from safety concerns to compensation concerns. (Tr. at 63-64, 72, 75, 88, 97-98, 207).

The evidence shows that during the week of November 24, 2001, the timesheet completed by Complainant was on F & E letterhead, rather than that of Respondent. Complainant was unsure as to the reason for its use but surmised that his wife who completed the paperwork had run out of Respondent's timesheets.[6] (RX 3; Tr. at 107-110).

On or about November 26, 2001, all the drivers were to attend a meeting to discuss these various problems with Trussway officials. (***See***, ***e.g.***, Tr. at 69, 94).[7] Complainant stated that the purpose of this meeting would be to ask Trussway to try "to force [Respondent's] hand to do something [about the safety problems]." (Tr. at 69). On the morning of November 26th, however, Mr. Dianza [Trussway's on-site manager] informed Mr. Worthem and Mr. Finnell [two of Respondent's drivers] that the meeting was canceled. (Tr. at 71). When Complainant received this news, he objected to the cancellation and told Mr. Worthem and Mr. Finnell that they should "just shut them down and go upstairs and tell them [that the drivers were] not going to pull until [they] [met] with" the Trussway representatives.[8] (Tr. at 71; ***see also*** Tr. at 94). Complainant expressed these sentiments to Mr. Ward and Mr. Dianza, and the meeting was held shortly thereafter. (Tr. at 71).

Alleged inciting of a strike. Of the five witnesses who operated trucks for Respondent that testified, only one testified that he believed employees were seeking to strike on the day of the meeting.[9] (Tr. at 146). The other employees recognized that Complainant was trying to gather employees for a meeting but not suggesting that they refuse to take their loads, and they planned to continue on their delivery routes after the meeting. (Tr. at 122-123, 130, 140, 158). During the previous week, Complainant spoke to Mr. Myers [the Trussway supervisor] and

[6] "F & E Trucking" was the name of the company that Complainant operated as an independent contractor. (See Tr. at 107).

[7] Although November 26, 2001 fell on a Monday, there was testimony to the effect that the meeting took place on Tuesday. (***E.g.***, Tr. at 69, 72). There was some confusion among the attendees as to the exact dates of the meetings.

[8] Complainant explained that he threatened to "shut them down" not in an attempt to incite a strike but to force Trussway officials to attend the meeting they promised would occur but had cancelled. (Tr. at 212-13).

[9] Respondent employee Manuel Vasquez testified that Complainant told him there was going to be a strike. (Tr. at 146, 152). However, Mr. Vasquez testified that when he arrived at the meeting, he was told to take out his load but to give the paperwork directly to Trussway. (Tr. at 148-49, 150-51).

asked him to inform Trussway officials that the drivers wished to meet with them to discuss the on-going safety problems they were experiencing. (Tr. at 69, 94). Once the meeting was confirmed, Complainant began to notify the other drivers that they would all have an opportunity to speak with Trussway officials on November 26th about these problems. (Tr. at 75, 94, 97). Mr. Ravenell [Respondent's general manager] testified that Mr. Myers watched Complainant "attempt to organize the guys and get them to strike."[10] (Tr. at 181).

The November 26 meeting. The meeting was attended by Mr. Dianza, who presided over the meeting, and Trussway's operations manager, as well as most, if not all of the drivers. No representatives of Respondent were present. (Tr. at 70, 72, 96, 101, 114-15). The testimony of the drivers shows that the purpose of the meeting was unclear to most, with responses ranging from safety to pay to management issues. Because the drivers came and went during the meeting, they each present largely different accounts from one another about what occurred at the meeting. All of the drivers with the exception of Mr. Vasquez testified to the substance of the meeting, describing in vague terms that it concerned compensation and safety. (Tr. at 122, 130, 134, 138-139, 154-155). On the other hand, Mr. Vasquez – who was a credible witness – testified that he attended the latter part of the meeting and became disenchanted and disinterested when Complainant told the drivers not to turn their work into Respondent but rather to give the paperwork (***i.e.***, the timesheets) straight to Trussway. (Tr. at 145-148, 150-51). Mr. Vasquez declined to do so. (Tr. at 148). According to Complainant, the meeting was "very good," with the Trussway representatives promising the drivers "the moon." (Tr. at 71, 100). The drivers were assured that the problems they identified, which included the safety issues as well as the compensation issue, would be addressed. (Tr. at 71-72, 96).

The Termination. A couple of days after this meeting, corporate officials from Trussway met with Respondent.[11] (Tr. at 72, 184-85, 202). This meeting was attended briefly by Mr. Myers and Mr. Ward [Trussway supervisors], who were questioned about Complainant. (Tr. at 72). Both stated that Complainant was a hard worker and one of the better employees. (***See*** Tr. at 72, 185). However, on November 30, 2001, Mr. Ward told Complainant that he, Dexter Ravenell [Respondent's general manager], Mrs. Callie Riley [Respondent's President and the wife of Respondent's former owner],[12] Mr. Dianza [Trussway's on-site manager], and Mr. Myers all met to discuss Complainant. Later that day, Complainant received his letter of termination (signed by Mrs. Riley) informing him that "his services [were] no longer needed." (RX 1; Tr. at 74-75). While the letter does not explain the basis for this determination, Complainant testified as to his belief that he was terminated due to Respondent's perception that he was attempting "to steal the [Trussway] contract" from Respondent.[13] (Tr. at 75). Complainant testified that he never attempted to "steal" the contract away from Respondent and that he never attempted to gain the other drivers' loyalty on this issue. (***See*** Tr. at 75).

[10] Mr. Myers, in his testimony, does not address whether he considered Complainant's actions to be inciting the other employees to strike. (Tr. at 21).

[11] Trussway's vice president Jim Thomas (who was not a witness) was present at the meeting. (Tr. at 202).

[12] Mr. Ravenell testified that although Mrs. Riley was the President, Maurice Riley actually ran the operation. Mr. Riley died in February of 2002. (Tr. at 202.).

[13] Complainant was never actually told why he was terminated by Respondent. (Tr. at 209).

James Dexter Ravenell testified, on the other hand, that the contract with Complainant was terminated because he was "attempting to take the Trussway contract from [them] and for organizing a strike, which included the shutdown of loads earlier in that week." (Tr. at 174). Mr. Ravenell wholly denied terminating Complainant for complaining about and bringing attention to safety violations being committed by Respondent. (Tr. at 175). Furthermore, he explained that he learned of the letter Complainant had written a few months prior, where Complainant presented a business proposal to Trussway, and terminated his employment relationship with Respondent later that day. (Tr. at 179). Mr. Ravenell testified, however, that in previous communications he had with Complainant, Complainant informed him that he had entered into discussions about a contract with Trussway.[14] (Tr. at 180) Complainant explained that he did not attempt to keep his communications with Trussway secret, but rather he informed Mr. Ravenell that he had spoken with someone from Trussway about the safety issues and submitted a business proposal to them. (Tr. at 205). In sum, based on his prior communications with Complainant and other drivers at Respondent,[15] in conjunction with the proposal letter submitted to Trussway, Mr. Ravenell perceived that Complainant was attempting to win the Trussway account and replace Respondent as the carrier. (Tr. at 179-181).

Respondent's Damages:

After being terminated, Complainant experienced financial hardship and testified that he had trouble meeting his monthly payments for his home mortgage and truck and, ultimately, had to borrow money from friends and family to meet these payments.[16] (Tr. at 76, 78). In addition, Complainant stated that he failed a routine physical due to high blood pressure, which he never experienced previously. (Tr. at 76). Complainant attempted to procure work directly from Trussway but was unable to obtain such employment because of the exclusive contract that it had with Respondent covering all hauling services.[17] (Tr. at 76). Despite making several different contacts in the trucking industry, Complainant was unable to find regular work for approximately four months. He does not blame the extended length of his job search on Respondent or a diminished reputation resulting from his termination but merely attributes it to seasonal conditions. (Tr. at 76-77, 112-14). Complainant currently works for Tyson Chicken but is earning less than when he was working for Respondent. He is still not meeting some of his monthly payment obligations. (Tr. at 79).

Legal Background

The employee protection provisions of the STAA, 49 U.S.C. §31105, prohibit discriminatory treatment of employees who have engaged in certain activities related to

[14] Mr. Ravenell told Mrs. Riley about the conversation with Complainant and she called Trussway to determine what was occurring and was assured by Trussway that Respondent had "[nothing to] worry about." Mr. Ravenell does not remember exactly when this happened but surmised it was around September 2001. No action was taken by Respondent against Complainant at that time. (Tr. at 180-181).

[15] Mr. Ravenell indicated he spoke to six or seven drivers that agreed Complainant was trying to undermine Respondent. (Tr. at 181).

[16] Claimant testified that he earned approximately $80,000.00 yearly while working for Respondent. (Tr. at 110).

[17] Complainant claims that while Trussway explained to him that the exclusive contract between it and Respondent prevented it from hiring Complainant as an independent contractor, Trussway had previously hired drivers on an independent contract basis. (Tr. at 76).

commercial motor vehicle safety. To invoke the whistleblower provisions of the STAA, complainant has the burden of proof to establish that he engaged in protected activity and that he was subjected to adverse action. He must also present evidence that Respondent was aware of the protected activity and took adverse action because of this awareness. ***Byrd v. Consolidated Motor Freight***, 1997-STA-9 at 4-5 (ARB May 5, 1998).

Under 49 U.S.C. §31105 (a)(1)(A), an employee is engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Courts have found that it is "eminently reasonable" for the DOL to interpret this provision to include internal complaints from an employee to an employer." ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 20 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed and thus the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. ***Id***. at 22. A safety complaint made to any supervisor in the chain of command is deemed to be protected activity. ***Zurenda v. J & K Plumbing and Heating Co., Inc***., 1997-STA-16 at 5 (ARB, June 12, 1998).

An employee is also protected under the STAA when an employee refuses to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. 49 U.S.C. §31105 (a)(1)(B)(i). Protection under this clause does not depend on actually proving a violation of a commercial safety regulation, standard or order. It is enough that the complaint merely relate to such a violation. ***Schulman v. Clean Harbors Environmental Services, Inc.***, 1998-STA-24 at 7 (ARB Oct. 18, 1999). Similarly, the STAA protects an employee who refuses to operate a commercial motor vehicle, which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. 49 U.S.C. §31105(a)(1)(B)(ii); ***Schulman***, 1998-STA-24 at 8. If an employee objects to an unsafe condition but nevertheless drives the truck, the protection afforded the employee should be analyzed as a "complaint" under 49 U.S.C. §31105 (a)(1)(A), not a refusal to drive. ***Zurenda***, 1997-STA-16 at 5.

A complainant may establish unlawful discrimination in either of two ways. ***Wright v. Southland Corp***., 187 F.3d 1287, 1293 (11th Cir. 1999).

First, relying on the traditional approach, the complainant may show, through direct evidence that more likely than not, the respondent engaged in unlawful discrimination.[18] ***Id***. The respondent may avoid liability by asserting an affirmative defense if it can provide evidence of a legitimate purpose for engaging in such discrimination. The burden of proof shifts, placing the onus on the respondent to show, by a preponderance of the evidence, that it would have taken the same action, in the absence of discrimination. ***Se Mt. Healthy City School District Board of Education v. Doyle***, 429 U.S. 274, 287 (1977). If the trier of the fact concludes that the respondent was motivated by reasons that are both prohibited and legitimate (dual motives), the respondent may escape liability only by establishing that it would have reached the same

[18] The Court defines direct evidence for purposes of employment discrimination as "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity]." ***Wright***, 187 F.3d at 1293.

decision even in the absence of the protected conduct. Where the evidence of record clearly does not support a finding of any unlawful motive on the part of the respondent, the "dual motive" analysis is inappropriate. ***Schulman***, 1998-STA-24 at 10. ***Cf. Desert Palace dba Caesar's Palace Hotel & Casino v. Costa***, 123 S.Ct. 2148 (June 9, 2003) (under the 1991 amendments to Civil Rights Act, direct evidence of discrimination is unnecessary to obtain a mixed-motive jury instruction).

Since directly proving discriminatory intent may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination through circumstantial evidence. ***See Wright***, 187 F. 3d at 1290. The ARB has applied this approach in STAA cases, and in ***Byrd***, 1997 -STA-9 at 4-5, the ARB recently summarized the burdens of proof and production in this type of case (citations omitted):

> A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of a retaliatory motive. A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action.

When the nexus between the protected activity and the adverse employment action is established inferentially in this way, temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. ***See Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989); ***see also Simon v. Simmons Foods, Inc***., 49 F.3d 386, 389 (8th Cir. 1995). Once a complainant successfully raises the presumption of discrimination, then the respondent may produce evidence that the action was motivated by a legitimate nondiscriminatory reason. If a complainant is able to meet this burden, then the burden shifts back to the complainant once again to show that the proffered reason for discrimination was not the true reason for the adverse action. ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802 (1973). This concept is referred to as the "pretext" analysis. ***Id***. at 803.

The United States Supreme Court in ***Reeves v. Sanderson Plumbing Products, Inc***., 530 U.S. 133 (2000), explained the "pretext" phase of the analysis as introduced in ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 506-508 (1993). The Court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. To meet that ultimate burden, the complainant may, but not necessarily will, prevail based on the combination of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false. If the justification is determined to be false, the trier of fact may conclude

the employer engaged in unlawful discrimination. ***Reeves***, 530 U.S. at 140. Thus, there may be a valid inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

Regardless of whether a complainant establishes a *prima facie* case, the respondent may set forth an affirmative defense by showing that it had a legitimate business reason for terminating the employment relationship. ***Wignall v. Golden State Carriers, Inc.,*** 1995-STA-7 at 5 (Sec'y July 12, 1995). In ***Johnson v. Roadway Express, Inc.***, 1999-STA-5 at 12 (ARB Mar. 29, 2000), the ARB recognized that once a respondent produces evidence to articulate a legitimate, nondiscriminatory reason for its actions, the more relevant inquiry is "whether complainant prevailed, by a preponderance of the evidence, on the ultimate question of liability." More specifically, the ALJ should consider whether one of the real reasons for the complainant's dismissal from employment was his safety complaints. ***Id.***.

Discussion

To prevail in a whistleblower case under the STAA, complainant must establish that he was employed by an employer covered by the STAA; that he engaged in protected activity during the course of that employment; that the employer was aware of his involvement in the protected activity; that he was subjected to adverse employment action; and that there is a nexus between the protected activity and the adverse employment action. ***Byrd,*** 1997-STA-9 at 4-5.

Status as Employee and Employer:

At the outset, I note that Respondent has not disputed that it is an employer for purposes of the Act; nor has it disputed that Complainant is an "employee" under the STAA. On November 30, 2001, as a commercial motor carrier, Respondent was an employer subject to the employee discrimination provisions of the STAA. In a similar manner, as an independent contractor driving for Respondent on that day, Complainant fell within the Act's definition of "employee." ***See*** 29 C.F.R. § 1978.101(d) ("Employee" means "a driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle.")

Adverse Employment Action:

It is also clear from the undisputed facts that Complainant suffered adverse employment action by the termination of his employment contract with Respondent. On or about January 1, 2001, Complainant entered into a contract with Respondent to provide hauling services as an independent contractor. Complainant was employed in that capacity for almost 11 months until Respondent terminated the contract on November 30, 2001, discharging the Complainant on that day.[19] Such a discharge from employment is an adverse action under the Act.

[19] Respondent informed Complainant that his "services [were] no longer needed." (RX 1; Tr. at 74-75).

Protected Activity:

Whether Complainant was engaged in actionable protected activity under the STAA presents a closer question. From January 2001 to November 2001, during the course of his employment relationship with Respondent, Complainant was unsatisfied with the safety of Respondent's equipment used for delivering goods and voiced these concerns on multiple occasions. These conversations occurred on a frequent basis with Billy Myers, who was Trussway's shipping and receiving supervisor, at the yard and every once in a while with Maurice Riley, deceased, former owner of Respondent. Complainant spoke with Mr. Riley on more than one occasion, even relaying his desire to file a formal complaint. Safety concerns were also raised by Complainant at the November 26 meeting, but none of Respondent's managers or supervisors attended that meeting (although they attended a subsequent meeting, during the course of which the previous meeting was discussed.) Despite his constant agitation with the safety of the equipment, at no point did Complainant refuse to take a load. Although taking the initial steps, Complainant did not pursue filing a complaint with DOT.

Respondent argues that though Complainant voiced safety concerns, they do not constitute protected activity because in over 400 loads that he hauled, Complainant never documented a safety problem and never refused a load. Though a lack of documentation is significant, it does not preclude STAA coverage because it has been held reasonable to consider complaints made through internal communications alone subject to the Act. Moreover, oral communications, if they are not too generalized, and are sufficient to give notice that a complaint may be filed, are considered to be protected activity. ***See Clean Harbors***, 146 F.3d at 20. The communications Complainant made with Mr. Riley and others are deemed internal complaints and thus, the concerns that Complainant voiced about safety constitute protected activity from which Complainant was protected from unlawful discrimination.

Thus, I will treat Complainant's informal complaints as protected activity (not a refusal to drive) and analyze accordingly. ***See Zurenda***, 1997-STA-16 at 3.

Employer's Notice of Protected Activity:

Complainant expressed safety concerns to supervisors at both Respondent and Trussway; however, his daily complaints were made to Trussway representatives, not Respondent. The concerns heard only by Trussway representatives cannot be attributed to Respondent because there has been no evidence presented that shows Trussway discussed safety complaints with Respondent until just prior to Complainant's termination, and more importantly, there is no evidence that Trussway attributed any safety concerns that they may have raised to Complainant prior to that time.

Although none of Complainant's safety concerns were documented in writing, supervisors of Respondent were fully aware of the problems Complainant had with the safety of Respondent's trailers and failure to issue licenses. In addition to his direct complaints to Mr. Riley, Complainant's frustration and concern with safety issues culminated in the occurrence of the November 26th meeting, which Complainant allegedly scheduled as a platform to discuss safety concerns. Even though none of Respondent's managers attended the meeting, Trussway

met with them a few days afterwards to inform them about the meeting and other incidences of Complainant bringing safety concerns to their attention, and Complainant's termination immediately ensued. While Mr. Ravenell testified that he knew of no safety complaints by Complainant, the evidence shows that he was present at a meeting (occurring on or before November 30, 2001) attended by both Trussway and Respondent management and that Trussway discussed what happened at the November 26th meeting, including the safety concerns that were addressed. Later on November 30, 2001, Complainant received a letter terminating his employment with Respondent.

Additionally, in one particular instance occurring approximately six months prior to his termination, Complainant went to the DOT to file a formal complaint but was dissuaded from formally filing it by the overworked officers there. Complainant did, however, inform Mr. Riley personally of this incident, ostensibly in an attempt to get the problems corrected.

In view of the above, I find that Complainant made enough contacts with management at Respondent to put them on notice of Complainant's safety concerns and thus his engagement in protected activity. Since I have found that Respondent was aware of Complainant's protected activity, I must determine whether Complainant was terminated because he raised safety concerns to Respondent.

Causal Relationship:

Complainant has already shown by a preponderance of the evidence that his employment relationship with Respondent falls within the purview of the STAA, he was subject to adverse action, he engaged in protected activity, and Respondent was on notice thereof. To fully establish unlawful discrimination, he must also show a causal relationship between Respondent's adverse action and the protected activity. Complainant can establish causation by showing that Respondent was aware of the activity and acted in response to it. As noted above, there are two approaches to establishing this element of unlawful discrimination – either by directly showing a causal relationship or by establishing a causal relationship inferentially. ***Wright***, 187 F.3d at 1290.

Direct Evidence of Causal Relationship. Under the first approach, Complainant must show through direct evidence that it is more likely than not that Respondent engaged in unlawful discrimination. Complainant is unable to meet this burden based upon the direct evidence of discrimination before me. Specifically, the only arguably direct evidence of discrimination is the admission by Mr. Ravenell that his termination of Complainant was motivated in part by Complainant's alleged organizing of a strike.[20] In fact, the temporary cessation of work, which Mr. Ravenell characterized as a "strike," was necessitated by the drivers' attendance at the meeting that was being held with Trussway for the purpose of discussing safety and other issues. Thus, there was some direct evidence that the Complainant was fired as a result of protected activity, consisting of his activities in organizing a meeting at which safety concerns could be

[20] As discussed below, I do not find the actions by Complainant and the other truckers to constitute a formal strike. Rather, the truckers delayed taking their loads out so that they could attend the scheduled meeting with Trussway representatives. However, they apparently coerced the Trussway representatives into attending the meeting by refusing to take out their loads unless and until the meeting was held.

addressed and his stoppage of work in furtherance of that goal. However, I do not find this sufficient for Complainant to meet his burden of establishing unlawful discrimination.

Dual Motives Analysis. To the extent that Mr. Ravenell's admission constitutes direct evidence of discrimination, this case would require a "dual motive" analysis. The dual motive analysis is appropriate when it is found that the employer's adverse action against the employee was motivated by both prohibited and legitimate reasons, i.e., that the employer had dual motives. ***Schulman***, 1998-STA-24 at 10. Here, the Respondent has asserted an alternative basis for its actions. In this regard, Respondent had a legitimate business reason for terminating its employment contract with Complainant. The weight of the evidence shows that Respondent terminated Complainant because Complainant was a disloyal employee who was using his employ to gain an advantage in winning the Trussway contracts and his removal was necessary for Respondent to protect its contract with its most valuable customer. Thus, two valid reasons have been presented as motive for Respondent's termination, thereby giving rise to the dual motive analysis.

Complainant cannot meet his burden under a dual motive analysis. When dual motives for the termination are present, Respondent can still avoid liability by showing by a preponderance of the evidence that it would have made the same decision as to the employee's discharge even in the absence of the protected conduct. ***Id***. Respondent met this burden by showing the detriment it would have suffered if Complainant continued to be employed by Respondent, providing him access to the people and paper work that Complainant needed to potentially take over the Trussway contract. It can be inferred from the facts that Complainant took active steps to acquire the contract with Trussway for himself. As a result, Respondent feared losing its contract with a valued customer and reasonably disconnected itself from a rival for its Trussway business. Notwithstanding any protected activity in which Complainant engaged, Respondent terminated its employment relationship with Complainant because Respondent had a legitimate fear that Complainant was undermining Respondent and pursuing a course of action that had the potential of severely harming Respondent's business interests. Even assuming that Complainant's conduct of a safety meeting and related work stoppage was part of the reason for his being fired, I find that his employment would have been terminated in the absence of such activity. Therefore, assuming, arguendo, direct evidence of discrimination, I find that Respondent is nevertheless able to avoid liability because it has proven that even if Complainant had not engaged in the protected activity, Respondent still would have terminated him.

Indirect Evidence of Causal Relationship. Alternatively, under the second method, Complainant can prove unlawful discrimination using circumstantial evidence. If Complainant can successfully show that a protected activity likely motivated the discrimination, a rebuttable presumption of discrimination can be raised. ***Wright***, 187 F.3d at 1290. I have found that Complainant has shown that he engaged in protected activity of which Respondent was aware and that he suffered adverse employment action. To invoke this presumption, Complainant must establish the existence of a "causal link" between the adverse action and the protected activity. ***Byrd,*** 1997-STA-9 at 4-5.

Temporal proximity may be considered as circumstantial evidence in determining whether a causal link existed between the adverse action and the protected activity. Complainant requested a meeting to discuss safety and other issues on November 26th, just four days before being terminated. When Trussway supervisors cancelled the meeting, Complainant angrily threatened to "shut them down" unless they kept their promise of holding the meeting. Complainant did not intend to "strike" or have other drivers refuse to take their loads, he simply wanted to be heard at the meeting that was supposed to take place, so he made this threat. Complainant's tactic was apparently successful because shortly after making that statement, the meeting was held as scheduled.

Although it is difficult to ascertain exactly what happened at this meeting because each witness apparently observed a different portion of the meeting, it is clear that safety issues were discussed that day. There were a number of other things brought up at the meeting, including Complainant's potential business take-over; however, none of these other issues discount the fact that Complainant raised safety concerns there and was terminated shortly thereafter. Only four days after this meeting took place, Respondent terminated its employment contract with Complainant. Specifically, Respondent informed Complainant that his "services [were] no longer needed" on November 30, shortly after meeting with Trussway representatives and being informed of the events that took place on November 26th.[21] A nexus between protected activity and an adverse employment action may be established indirectly when the temporal proximity of the two events is sufficient to raise the inference that the adverse employment action was taken in retaliation for the protected activity. ***See Couty***, 886 F.2d at 148. I find that the facts presented here give rise to the inference that the termination of Complainant's employment relationship was done in retaliation for Complainant's protected activity. In sum, Complainant is able to carry his burden of proving a *prima facie* case of retaliatory discrimination.

Pretext Analysis. This is not, however, the end of the inquiry.[22] Respondent may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason.[23] If Respondent produces such evidence, Complainant may in turn show that the proffered reason was not the true reason but was a mere "pretext."

Here, Respondent argues that the real reason for firing Complainant was that he was undermining his employment with them by entering into discussions with Trussway, Respondent's client, to take over the contract. Furthermore, Respondent explains, through the

[21] No managers from Respondent were present at the November 26th meeting, and so they were apparently first informed about the substance of the meeting at their meeting with Trussway occurring on or about November 30th, the day that Complainant was terminated.

[22] In fact, it is not necessary for the undersigned to evaluate the merits of the prima facie case if Respondent presents overwhelming evidence of a legitimate business reason for the termination. When Respondent presents such proof, the more relevant inquiry is whether complainant prevailed, by a preponderance of the evidence, on the ultimate question of liability. ***Wignall***, 1995-STA-7 at 5. More specifically, the ALJ should consider whether one of the real reasons for Complainant's dismissal from employment was his safety complaints. ***Johnson***, 1999-STA-5 at 12.

[23] In cases where a respondent asserts that a complainant's offensive behavior justified his discharge, the factfinder may treat the argument that the employee's behavior was the real reason for the discharge in the prima facie case and/or consider it as an affirmative defense that the employer had the right to discharge the employee in spite of the employee's protected conduct. Thus, this type of case can be analyzed either as a "pretext" or as a "dual motive" case. ***N.L.R.B. v. Cement Transportation, Inc.***, 490 F.2d 1024, 1029 n.6 (6th Cir. 1974), *cert. denied*, 419 U.S. 828 (1974).

testimony of Mr. Ravenell, that Complainant was terminated on November 30, in particular, because that is when Respondent became fully aware of Complainant's attempts to take over the contract. Though Complainant presented a business proposal to Trussway in August 2001, Respondent was not aware of his actions or did not understand the implications of Complainant's actions until the week of November 26, which ended with the termination of Complainant's contract.

Moreover, on the morning of November 26th, Complainant engaged in disruptive behavior by threatening to shut down Trussway and encouraging other employees to refuse to take their loads. Though I have found that Complainant was not attempting to incite a strike, threatening to interfere with the business of Respondent's major customer that day was not exactly model employee conduct. Even when employees engage in protected activity, employers may legitimately discipline them for insubordination and disruptive behavior. ***Logan v. United Parcel Service***, 1996-STA-2 (ARB Dec. 19, 1996) (in dual motive case, the respondent established by a preponderance of evidence that it would have discharged the complainant even if not for the protected activity where the complainant was insubordinate with a manager, acted inappropriately toward officials and had a history of past disruptions and threats, and he could not explain his behavior). Assertions that a complainant engaged in "acts of dishonesty" have been held to be proper articulations of legitimate, non-discriminatory reasons to discipline an employee. ***See Clifton v. United Parcel Service,*** 1994-STA-16, 21 (Sec'y May 9, 1995). While the evidence shows that Complainant was a good employee for the majority of the duration of his employment, his actions on November 26 were insubordinate and disruptive, warranting disciplinary action.

Even putting aside his insubordinate and disruptive behavior, Complainant's efforts to take the Trussway contract from Respondent are sufficient to justify Respondent's adverse action against him. I have made a credibility determination that Complainant's use of an F & E timesheet during the week of November 24, 2001, rather than that of Respondent, indicates that Complainant was taking active steps to take the contract with Trussway from his employer.[24] The evidence shows that Complainant made initial contact with Trussway in August 2001 and over the next few months, tried to rally Respondent's employees to join him in his new endeavor. During his final week of employment with Respondent, Complainant went so far as to use F & E letterhead, representing his own company as the service being used to deliver goods for Trussway.

Complainant also held a meeting (the November 26th meeting) with Trussway and Respondent's other employees, during which he advertised to the truck drivers why working for him would be better than for Respondent. Specifically, he was willing to reduce his portion as owner of the contract with Trussway to 10 percent of all delivery fees. Respondent had been taking 15 percent of the fees. These actions of Complainant quite clearly indicate his desire to win the contract with Trussway. The potential gain to Complainant was significant because not only would he not have to pay a portion of his earnings to Respondent, but also he would increase his revenues by a cut from each of the drivers who agreed to work for him. During the

[24] I reject as implausible Complainant's explanation that his wife coincidentally used the wrong time sheets, with Complainant's business name [F & E Trucking] at the top, for the week preceding the meeting. I did not find Complainant to be a credible witness.

meeting, Complainant also suggested to the drivers that they submit their timesheets directly to Trussway or to himself. Complainant appeared to be leaving Respondent out of the proverbial loop, to avoid their involvement in the new contract that he planned to initiate with Trussway.

Finally, the employer's subjective perception of the circumstances is considered. If Respondent believed its stated reason for the termination was credible given the totality of the circumstances, further support for Respondent's legitimate business reason for the termination exists. ***Collins v. James River Co., Inc.***, 1994 WL 92199 (Mass. Dist. Ct. 1994). Therefore, even if Complainant had taken all of those steps with another objective in mind, I find that it was reasonable for Respondent to believe that Complainant presented a serious threat to its contract with Trussway.

Because Respondent has produced evidence to rebut the *prima facie* showing of discrimination, the burden is on the Complainant to prove that the proffered reason was not the true reason for the adverse action and the protected activity was the reason for the action. Complainant has not met this burden. Complainant denies attempting to take the Trussway contract from Respondent; however, the evidence clearly shows that is exactly what he was trying to do. Although his impetus for entering into discussions with Trussway about taking over the business may have been sparked by safety concerns, he nevertheless sought to take Respondent's most valuable customer from it. Complainant even admitted that he would have taken the contract because he was tired of the safety problems. Again, Complainant's motivation to win the contract is irrelevant to the fact that he was not a loyal employee to Respondent. Without more, Complainant cannot prove that the reason Respondent proffers for the termination is not the true reason for the termination and thus the adverse action of Respondent was not unlawfully discriminatory. Accordingly, Complainant's claim must be denied.

Conclusion:

As Complainant cannot prove that the legitimate business reason proffered by Respondent was not the true reason for the adverse action, he cannot prevail in this action. Accordingly, I recommend that the complaint in this matter be denied.

ORDER

IT IS HEREBY RECOMMENDED that the claim of Complainant, Mr. Floyd Lucas, for unlawful discrimination under the STAA be **DISMISSED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington DC

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. ***See*** 29 C.F.R. § 1978.109 (a)**;** 61 Fed. Reg. 19978 and 19982 (1996)